APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1280

Thomas Shortbull,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court of South Dakota.
Stanley Looking Elk, Elijah Whirlwind Horse, James Mousseau, Ivan Bettelyoun, Marvin Amiotte, Gerald "Jump" Big Crow, Lyman Red Cloud, Delores Whitehead, Edgar High Whiteman, Gilbert Mathews, Dave Brewer, and Jerry Matthews	*	
Appellees.'	*	

Submitted: December 16, 1981

Filed: May 3, 1982

Before BRIGHT and ROSS, Circuit Judges, and LARSON, Senior District Judge.*

Thomas Shortbull brings this appeal challenging the district court's order granting summary judgment against him. We affirm.

The facts are set out fully in the district court's memorandum opinion. See Thomas Shortbull v. Stanley Looking Elk, et al., No. 80-5035 (D. S.D., filed February 19, 1981). Appellant Thomas Shortbull is a non-enrolled member of the Oglala Sioux Tribe.

A member of the Tribe is defined in the Tribal Constitution as follows:

> Section 1 -- The membership of the Oglala Sioux Tribe shall consist as follows:
>
> (a) All persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935, provided, that correction may be made in said rolls within five years from the adoption and approval of this constitution by the tribal council subject to the approval of the Secretary of Interior.
>
> (b) All children born to any member of the tribe who is a resident of the reservation at the time of the birth of said children.
>
> Section 2 -- The tribal council shall propose bylaws covering future membership and the adoption of new members.

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*Earl R. Larson, United States Senior District Judge, District of Minnesota, sitting by designation.

An enrolled member is a person on the 1935 census roll of the Pine Ridge Reservation or the child of any tribe member who was a resident of the reservation at the time of the child's birth. Shortbull is a non-enrolled member, or N.E., because although his father is a member of the Tribe, Shortbull was born off the reservation in Igloo, South Dakota, where his father was employed.

The controversy involved in the present suit arose when Shortbull filed nominating petitions to have his name placed on the ballot for the January 1980 primary election for the office of President of the Oglala Sioux Tribe on the Pine Ridge Reservation. Shortbull's nominating petitions were rejected by the Tribal Election Board because the tribal ordinances required that the President be an enrolled member. Shortbull then sought permission to run in the primary election from the Tribal Council. On January 24, the Council enacted Tribal Resolution 80-12, which provided:

> BE IT RESOLVED that the Oglala Sioux Tribal Election Board is hereby directed and authorized to forthwith accept the petition of Thomas Shortbull to run for Tribal President and certify him as a candidate in the upcoming election.

The resolution indicated that the Tribe had experienced difficulty in providing a procedure whereby memberships in the Tribe could be processed, and had enacted ordinances providing for enrollment that had not been implemented[1]. On January 29, the Council passed a subse-

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[1]Tribal Ordinance 79-08 established the following procedures for enrolling tribal members born since 1935:

quent resolution that stated: "Tribal Council body to uphold the Constitution and By-laws and Election Ordinance, and also uphold any decisions of the Election Board." Appellees asserted that this January 29 resolution rescinded Resolution 80-12, but on January 30 Chief Tribal Court Judge H. Clyde Red Shirt disagreed, and ordered the Election Board to certify Shortbull as a candidate and place his name on the ballot pursuant to the Council's January 24 resolution.

Footnote 1 continued

> Section 201. Publication of Preliminary List. The Department of Enrollment shall at the earliest possible opportunity publish a preliminary list of all enrolled members of the Oglala Sioux Tribe, listing names, date of birth, and degree of tribal ancestry. A copy of that list shall be available for inspection at the office of the Oglala Sioux Tribe during regular business hours and at such other conspicuous [sic] public places throughout the Pine Ridge Indian Reservation as the Department of Enrollment may direct.
>
> Section 202. Claims for Enrollment. (a) Any person born prior to the date of publication of the preliminary list of enrolled members who does not appear on the list and for whom a claim for enrollment is made, may apply for enrollment to the Department of Enrollment, either in person, in in the case of a minor or a person non compos mentis through a parent, guardian, or next friend. Such application shall be made on such form as the Department shall prescribe and shall be filed within six months of the date of publication of the preliminary list.
>
> (b) The names of all applicants for enrollment under subsection (b) shall be posted on the public bulletin board of the Oglala Sioux Tribe and at such other conspicuous public places through the Pine Ridge Indian Reservation as the Department of Enrollment may direct, for at least

Footnote 1 continued

fourteen days before any application may be acted on by the Department.

Residency Requirements: (a) A person who leaves the Resevation for service in the armed forces of the United States or for any other employement with the United States Government or for attendance at an educational institution shall be considered to be a resident of the reservation for as long as such service, employment or attendance continues and for an additional six months.

(b) A person who left the reservation for the purpose of employement during the period December 7, 1941 through August 14 , 1945, and returned to reside on the reservation on or before December 31, 1945, shall be considered to be a resident of the reservation during the period of such absence.

(c) A person who resided within the former Pine Ridge Aerial Gunnery Range and left the reservation following or in anticipation of the taking of the Gunnery Range by the United States Government, and returned to reside on the Reservation on or before December 31, 1945, shall be considered a resident of the reservation during such absence.

(d) A person who leaves the reservation for the purpose of employement shall be considered a resident of the reservation during such absence if: (1) he or she continues to own an interest (legal or beneficial) in land within the reservation, or (2) he or she returns to reside on the reservation within five years.

(e) A person who leaves the reservation and thereby ceases to be a resident shall be considered to have reestablished residence on the reservation if such person maintains his or her permanent residence on the reservation for a period of one year.

This ordinance has not been implemented, but Shortbull's attorney argued to the Tribal Council that Shortbull met the residency requirements of provisions (a), (d) and (e) of the ordinance.

Footnote 1 continued

The January 24 resolution (Resolution 80-12) provided in full:

RESOLUTION DIRECTING THE OGLALA SIOUX TRIBAL ELECTION BOARD TO CERTIFY THOMAS SHORTBULL AS A CANDIDATE FOR TRIBAL PRESIDENT.

WHEREAS, the Oglala Sioux Tribe has experienced considerable difficulty in providing for a procedure to process applications for membership in the Tribe and nothing definitive about such procedure has been accomplished for a great many years, and

WHEREAS, certain ordinances passed by the Tribe governing enrollment have not been implemented in time for various persons to vote and run for Tribal Office, and

WHEREAS, previously, non-enrolled members of the Tribe have been frustrated in their attempts to participate in Tribal Government to the full extent even though they were entitled to membership by [sic] have been unable to vote or run for office, with few expections [sic], and

WHEREAS, Thomas Shortbull, who is registered as N.E. presented his sufficient petitions to run for Tribal President to the Tribal Election Board prior to the deadline on January 9, 1980 and even though he also presented his documentation to said Board, it has refused to act on these petitions and to certify him as a candidate in the upcoming election, and

WHEREAS, time is of the essence and unless the Council takes action to certify him as a candidate, he will be prevented from running in the upcoming election, now

THEREFORE, BE IT RESOLVED that the Oglala Sioux Tribal Election Board is hereby directed and authorized to forthwith accept the petition of Thomas Shortbull to run the Tribal President and certify him as a candidate in the upcoming election.

On February 1, Chief Judge Red Shirt held certain tribal officials in contempt for failing to place Shortbull's name on the ballot, but because of this action, the Tribal Executive Committee suspended Judge Red Shirt[2] and replaced him with Judge Whitehead. Judge Whitehead quashed Judge Red Shirt's orders, and the Election Board notified Shortbull that he was not eligible to run for Tribal President. On February 4, Judge Red Shirt ruled that he was still Chief Judge and had arrest warrants issued for those persons he had held in contempt of court on February 1. He also ordered the postponement of the February 5 primary election. Judge Whitehead immediately quashed the arrest warrants and ordered that the February 1 contempt citations be purged from the records. The primary election was held February 5, and Shortbull did not participate as a candidate.

On March 17, 1980, Shortbull brought the present action in Federal court under 42 U.S.C. § 1985 (c)[3] against defendents Judge Whitehead, the Tribal President, two tribal attorneys, and various other tribal officials, including the members of the Tribal Election Board and the members of the Tribal Executive Committee. In his complaint Shortbull alleged that these individuals conspired to deprive him of his right--as determined by Judge Red Shirt and the Tribal Council resolution--to have his name placed on the ballot for the primary election. District Judge Andrew Bogue ruled against the appellees' motion to dismiss

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[2]Shortbull alleged that this suspension was illegal since Judge Red Shirt was not given a hearing and the Executive Committee gave no reasons for the suspension, although just cause is required by tribal ordinance.

and against Shortbull's motion to disqualify appellees' attorney, but after presenting the district court with Shortbull's deposition and accompanying exhibits, the appellees renewed their motion to dismiss and asked the district court to consider it a motion for summary judgement pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure. On February 19, 1981, the district court granted appellees' motion, and Shortbull has appealed.

In reviewing Judge Bogue's decision to grant summary judgment, we apply the same standard as the district court. Summary judgment may only be granted if there is no genuine issue of material fact: there may be no controversy that the appellees in this case have established their right to judgment. Summary judgment may not be granted if appellant Shortbull is entitled to recover under any circumstances, and the facts must be viewed in the light most favorable to him. See Vette Co. v. Aetna

[3]42 U.S.C. § 1985 (c) was codified as § 1985 (3) prior to 1976. This statute provides in part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section , if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Casualty & Surety Co., 612 F. 2d 1076, 1077 (8th Cir. 1980); Penne v. Greater Minneapolis Area Board of Realtors, 604 F. 2d 1143, 1148 (8th Cir. 1979); Butler v. MFA Life Insurance Co., 591 F. 2d 448, 451 (8th Cir. 1979).

In Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971), the Supreme Court set forth the four basic elements necessary to state a cause of action under 42 U.S.C. § 1985 (c): (1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws, (3) an act in furtherance of the conspiracy, and (4) resulting injury or the deprivation of any right or privilege of a citizen of the United States. Id. at 102-03. The Court in Griffin indicated that the second requirement "means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 102 (footnote omitted). In granting summary judgment the district court found that Shortbull had raised a factual issue as to the first, third, and fourth requirements established by Griffin, but determined that there was no conceivable set of facts that could support recovery as to the second element of the Griffen test. Shortbull's complaint in this regard alleged:

> Defendants' actions were motivated by an invidious discriminatory animus towards plaintiff, because of his membership in the class of people classified as "N.E." on the official B.I.A. Census rolls and his political opposition to said defendants.

The district court held that Shortbull's claim that he was discriminated against because of his individual political opposition to the appellees was not a class-based claim,

and his claim that he was discriminated against because of his status as an N.E. was not actionable under § 1985 (c) because the criteria defining the N.E. class were not invidious.

In Griffin, the Supreme Court ruled that a racially discriminatory conspiracy was actionable, see Griffin v. Breckenridge, 403 U.S. at 102 n. 9, 103, and the Court has implicitly held that discrimination on the basis of sex is sufficient under the statute, see Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 389 n. 6, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979), but beyond these two cases, there is significant confusion over what classes are protected under § 1985 (c). See Note, The Class-Based Animus of 42 U.S.C. § 1985 (c): A Suggested Approach, 64 Minn. L. Rev. 635, 642-44 (1980). Most courts have extended protection to other suspect-like classes, such as those based on religion, see, e.g., Ward v. Connor, 657 F. 2d 45 (4th Cir. 1981) (appeal pending); Marlowe v. Fisher Body, 489 F. 2d 1057 (6th Cir. 1973); Action v. Gannon, 450 F. 2d 1227 (8th Cir. 1971); Baer v. Baer, 45] F. Supp. 481 (N.D. Cal. 1978), or those defined by ideology or the exercise of a fundamental right. See, e.g., Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F. 2d 1335 (3d Cir. 1975); Glasson v. City of Louisville, 518 F. 2d 899 (6th Cir.), cert. denied, 423 U.S. 930 96 S. Ct. 280, 46 L. Ed. 2d 258 (1975); Cameron v. Brock, 473 F. 2d 608 (6th Cir. 1973); Puentes v. Sullivan, 425 F. Supp. 249 (W.D. Tex. 1977). The ultimate test, of course, is whether the classification is sufficiently "invidious" so as to fall within the statute's ambit. See Harrison v. Brooks, 519 F. 2d 1358, 1359-60 (1st Cir. 1975).

In Means v. Wilson, 522 F. 2d 833 (8th Cir.), cert. denied, 424 U.S. 958, 96 S. Ct. 1436, 47 L. Ed. 2d 364

(1975), this Court was confronted with another § 1985 (c) complaint arising from an election dispute on the Pine Ridge Reservation. In Means, we reversed the dismissal of the complaint filed by Russell Means, an unsuccessful candidate for President of the Oglala Sioux Tribe, and a group of his political supporters. All of the plaintiffs in Means were enrolled members of the Tribe, and we found that their complaint alleged a cause of action under § 1985 (c) because it stated that "defendants conspired and did overt acts in furtherance of a conspiracy to deprive the plaintiffs of their right to vote because they were supporters of plaintiff Means and members of the American Indian Movement." Id. at 839. We held that "[t]he group of plaintiffs in this case, by their affirmative acts of supporting plaintiff Means and the American Indian Movement and attempting to oust Wilson as their Council President, were a class against whom, according to the allegations of their complaint, the defendants discriminated against because of their class membership." Id. at 840 (footnote omitted).

We agree with the district court's assessment that Shortbull's allegations are distinguishable from those made by the plaintiffs in Means. Shortbull's suggestion that he was discriminated against because of "his political opposition to said defendants" does not apper to raise a class-based claim. The term class-based animus does not include personal animus, see Duff v. Sherlock, 432 F. Supp. 423, 429 (E.D. Pa. 1977) and cases cited therein, and Shortbull's allegation that appellees discriminated against him because of his individual political opposition to them is not actionable under § 1985 (c). See Lessman v. McCormick, 591 F. 2d 605, 608 (10th Cir. 1979) (no animus against anyone other than individual plaintiff debtor); McNally v. Pulitzer Publishing Co., 532 F. 2d 69, 75

(8th Cir.), cert. denied, 429 U.S. 855, 97 S. Ct. 150, 50 L. Ed. 2d 131 (1976) (citing McLellan v. Mississippi Power & Light Co., 526 F. 2d 870, 878 (5th Cir. 1976), aff'd in part, vacated in part, 545 F. 2d 919 (5th Cir. 1977); Carchman v. Korman Corp., 456 F. Supp. 730, 734 (E.D. Pa. 1978), cert. denied, 444 U.S. 898, 100 S. Ct. 205, 62 L. Ed. 2d 133 (1979) ("there must be a discriminatory animus toward a class, not toward an individual qua individual"). Indeed, Shortbull does not appear to question this determination on appeal.

The class-based claim that Shortbull urges on appeal is that he was discriminated against because of his status as a non-enrolled member of the Tribe. He asserts that he is being denied the right to run and vote in tribal elections solely because of his membership in the class of N.E.s, and that such discrimination is impermissible and actionable under § 1985 (c). We must disagree. The Oglala Sioux have an important interest in setting the standards for who may vote and run in tribal elections. In Daly v. United States, 483 F. 2d 700 (8th Cir. 1973), this Court held that the Crow Creek Sioux Tribe could iniformly require the Tribal Council members be one-half or more Indian blood, because "the Tribe has a sufficient cultural interest in setting a higher blood quantum requirement to hold office than for mere membership in the Tribe if it so desires." Id. at 705-06 (footnote omitted). The Court viewed such a standard as similar to the one contained in the United States Constitution that the President of the United States be a natural born citizen. See id. at 706 n. 4. Moreover, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n. 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). The right to define who

is eligible to run for office and vote in elections must be viewed in a similar manner. The policy of promoting Indian self-government, see, e.g., id. at 62, thus suggests that requiring presidential candidates to be enrolled members of the Tribe is a legitimate political determination that does not create an invidiously discriminatory classification. Because Shortbull has failed to demonstrate that the exclusion of non-enrolled members of the Tribe as a class is invidously discriminatory, the district court's grant of summary judgment must be affirmed.

We must, however, express serious concern that Shortbull's rights under § 1302 of the Indian Civil Rights Act (ICRA) [4] may never be vindicated. Shortbull alleges that the tribal court, Chief Judge Red Shirt, ruled that he was entitled to run in the primary election because of the Tribal Council's January 24 resolution. It appears that because of this ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the Tribal Executive Committee, who quashed Judge Red Shirt's orders. Such actions raise serious questions under the Indian Civil Rights Act, but because the Supreme Court determined in Martinez that there is no private right

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[4] Section 8 of the Indian Civil Rights Act provides as follows:

> 25 U.S.C. ' 1302. Constitutional Rights.
>
> No Indian tribe in exercising powers of self-government shall--
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> • • •
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

of action under the ICRA, Shortbull has no rememdy. Indeed, were we to find that he had alleged sufficient class-based animus to come within the ambit of § 1985 (c), we would have to confront the question of the source of Federal power to reach the private conspiracy under § 1985 (c). There is no question that the Martinez decision affects such a determination. See Means v. Wilson, 522 F. 2d at 838-39.

We are thus presented with a situation in which Shortbull has no remedy within the tribal machinery nor with the tribal officials in whose election he cannot participate, compare Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F. 2d 682, 685 (10th Cir. 1980), cert. denied, 449 U.S. 1118, 101 S. Ct. 931, 66 L. Ed. 2d 847 (1981), unless and until Congress provides otherwise. See Santa Clara Pueblo v. Martinez, 436 U.S. at 72. We question whether such a result is justified on the grounds of maintaining tribal autonomy and self-government: it frustrates the ICRA's purpose of "protect[ing] individual Indians From arbitrary and unjust actions of tribal governments," and in this case it renders the rights provided by the ICRA meaningless. Id. at 73, 83 (citations omitted) (J. White, dissenting).

Because we find that the district court was correct in its determination that the appellees' actions in preventing Shortbull from running for office because he was a non-enrolled member of the Tribe were not motivated by an invidiously discriminatory animus as required by § 1985 (c), we need not reach the questions of whether Shortbull failed to exhaust his administrative remedies or whether appellees' attorney should have been disqualified. The judgment of the district court is accordingly, affirmed.

A true copy.

attest:

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

APPENDIX

United States District Court

District of South Dakota

February 19, 1981

Mr. Ramon Roubideaux
Attorney at Law
P.O. Bos 277
Rapid City, South Dakota 57709

Mr. Dennis Hill
Attorney at Law
P.O. Box 290
Rapid City, South Dakota 57709

Re: Thomas Shortbull vs. Stanley Looking Elk, Elijah Whirlwind Horse, James Mousseau, Ivan Bettelyoun, Marvin Amiotte, Gerald "Jump" Big Crow, Lyman Red Cloud, Delores Whitehead, Edgar High Whiteman, Gilbert Matthews, Dave Brewer, and Jerry Matthews - CIV80-5035

Gentlemen: MEMORANDUM OPINION

This suit is brought under 42 U.S.C. § 1985 (3)[1]. It is presently before this Court on a motion for summary judgment made by the Defendants.

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[1]If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another for the purpose

The case arises out of a dispute concerning the primary and general elections for the office of Tribal President of the Oglala Sioux Tribe. Plaintiff charges that a conspiracy on the part of the Defendants in violation of 42 U.S.C. § 1985 (3) led to his name not being placed on the ballot for the primary election. To fully understand Plaintiff's allegations it is necessary to trace the facts leading upto the tribal elections.

On January 9, 1980, Plaintiff Thomas Shortbull filed his nominating petitions for the office of Tribal President. Even though Plaintiff's petitions apparently contained a sufficient number of names to meet the tribe's requirements for a presidential candidate, the tribal election board failed to take any action in regard to Plaintiff;s nominating petitions after receipt of them. The reason for

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Footnote 1 continued

of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

the board's refusal to certify Plaintiff as a candidate was that he is not an enrolled member of the Oglala Sioux Tribe[2]. After several tribal meetings and pleas by Plaintiff that he be certified as a candidate, on January 24, 1980, the Tribal Council adopted a resolution directing the tribal election board to certify Plaintiff as a candidate for the upcoming tribal election. However, on January 29, 1980, a resolution was adopted by the Tribal Council which provided for the "Tribal Council body to uphold the Constitution and By-laws and Election Ordinance, and also uphold any decision of the Election Board."

On January 30, 1980, H. Clyde Red Shirt, chief judge of the Tribal Court, ordered the Election Board to certify Plaintiff as a candidate and place his name on the February 5 primary election ballot. On February 1, 1980, Red Shirt held several tribal officials in contempt for failure to implement his order regarding the placement of Plaintiff's name on the ballot. He ordered these officials arrested. On this same day, the Tribal Council removed Judge Red Shirt from office and Judge Delores Whitehead quashed his previous orders. Furthermore, the Oglala Sioux Tribal Appeals Court stayed execution of Red Shirt's orders of February 1, 1980. Also on February 1, 1980, the election board notified Plaintiff that he was not eligible to run for tribal president because he was listed on tribal records as an N.E.

On February 4, 1980, Red Shirt ruled that he was still Chief Judge and had arrest warrents reissued for those persons he had held in contempt of court. He also ordered postponement of the February 5 primary election. On this

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[2]Plaintiff is registered in the tribal records as a non-enrolled member. Such a person is commonly referred to as an N.E.

same day, Judge Whitehead quashed Red Shirt's contempt citations of February 1 be purged. The primary election was held on February 5 as scheduled without Plaintiff's name on the ballot.

Plaintiff subsequently filed a suit in this Court on February 11, 1980. That suit, which named various tribal officials as defendants, was brought under 42 U.S.C. § 1985 (3) and 42 U.S.C. § 1983. In it, Plaintiff asked for damages and for this Court to declare the acts of the Defendants unlawful and to enjoin Defendants from taking such action in the future. Plaintiff subsequently filed a motion for a temporary restraining order attempting to enjoin the tribal general election which was scheduled for March 11, 1980.

On March 7, 1980, the Honorable Donald J. Porter denied Plaintiff's motion for a temporary restraining order and dismissed Plaintiff's complaint[3]. Judge Porter's dismissal of the complaint in the earlier case was primarily based on two factors. First, Plaintiff had failed to allege that the Defendant's alleged illegal acts were carried out in order to further their own cause. See Indian Political Action Committee v. Tribal Executive Committee, 416 F. Supp. 655 (D. Minn. 1976). Secondly, the complaint was dismissed because Plaintiff had failed to show he had exhausted his tribal remedies.

Plaintiff filed the complaint in the instant action on March 17, 1980. This action names as defendants Judge Whitehead, the tribal president, the members of the tribal

[3]Although the earlier case was filed with this Court, due to scheduling difficulties, the matter was transferred to the Central Division of the District of South Dakota.

election board, the members of the tribal executive committee, two tribal appellate judges and two tribal attorneys. Plaintiff claims that these Defendants conspired to deprive him of his right to vote and run for office in violation of § 1985 (3).

There are numerous similarities between this suit and Plaintiff's prior suit, however, Plaintiff made sufficient changes in his complaint so as to lead this Court to deny an earlier motion to dismiss filed by the Defendants. After presenting the Court with Plaintiff's deposition and accompanying exhibits, Defendants have renewed their motion to dismiss and have asked this Court to consider it a motion for summary judgment pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure.

After reviewing the pleadings, the memoranda of law filed by the parties, and Plaintiff's deposition and the accompanying exhibits, it appears to this Court that there exists no material issues of fact in regard to the question of Plaintiff's right to recover under § 1985 (3). Accordingly, summary judgment will be entered in favor of the Defendants.

In order to state a claim under §1985 (3) it must be alleged that (1) the Defendants conspired, (2) for the purpose of depriving any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws, that (3) one or more of the conspirators did or caused to be done any act in furtherance of the conspiracy, and (4) as a result, another was injured in his person or property or deprived of having and exercising any right or privilege of a citizen. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

Looking at the facts presented to this Court in a light most favorable to Plaintiff, it would seem that Plaintiff has at least raised a factual issue as to whether the acts of the Defendants fell within elements 1, 3 and 4 of the Griffin test. However, in regard to element 2 of the Griffin test, there is no conceivable set of facts which could support a support a recovery for the Plaintiff.

Plaintiff's complaint alleges the following:

> Defendants' actions were motivated by an invidious discriminatory animus toward plaintiff, because of his membership in the class of people classified as "N.E." on the official B.I.A. Census rolls and his political opposition to said defendants."

The second portion of this allegation would seem to be directed toward Plaintiff's individual political beliefs. There is no allegation that he is a member of a political group opposed to defendants who are being discriminated against; such existed in Means v. Wilson, 522 F. 2d 833 (8th Cir. 1975). Clearly, the discrimination covered by § 1935 (3) must be class-based[4] and this allegation does not appear to be so. Therefore, as far as discriminatory animus against Plaintiff because of his political beliefs is concerned, no claim under § 1985 (3) is stated.

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[4] "'As we read Griffin's language, the requirement means that motivating the conspiracy there must be a discriminatory animus toward a class, not toward an individual qua individual." Carchman v. Korman Corp., 456 F. Supp. 730, 734 (E.D. Pa. 1978), aff'd 594 F. 2d 354 (3rd Cir. 1979), cert. denied 444 U.S. 898 (1979). See also Lessman v. McCormick, 591 F. 2d 605, (10th Cir. 1979); McNally v. Pulitzer Publishing Co., 532 F. 2d 69 (8th Cir. 1976); McLellan v. Mississippi Power & Light Co., 526 F. 2d 870 (5th Cir. 1976); Poirer v. Hodges, 445 F. Supp. 838 (M.D. Fla. 1978).

The class which Plaintiff alleges is being discriminated against is the so called N.E.s, non-enrolled tribal members. He claims he is being illegally denied the right to vote and run for office because he is a member of this class. The definition of a class under Griffin is not at all clear. The various courts which have considered the question have reached numerous anc conflicting results. See Note, The Scope of Section 1985 (3) since Griffin v. Breckenridge, 45 George Washington L. Rev., 39 (1977). There is no question that racially based discrimination is included within § 1985 (3). The problem arises when attempting to define "otherwise class-based, invidiously discriminatory animus." Griffin, supra, at 102.

In regard to the class question, Plaintiff primarily relies upon Means, supra, which held that supporters of a candidate for tribal president constituted a class for the purposes of § 1985 (3). In this case we have an entirely different situation.

The N.E. class is composed of Indian people who for various reasons are not enrolled as tribal members[3]. It appears that generally, over the years, the tribe has not allowed N.E.s to vote or run for office. This is the reason Plaintiff was not certified as a candidate for tribal president. Plaintiff claims that this violates § 1985 (3).

Plaintiff argues that this Court should let this case go to trial so it can be determined if the tribe can legally ex-

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[3]Apparently the reason for Plaintiff being classified as an N.E. is the tribe's belief that Plaintiff's parents were living off the reservation at the time of his birth. Plaintiff argues that he should not be classified as an N.E., but that is not an issue in this lawsuit.

clude N.E.s from participation in tribal elections. The right of an Indian tribe to determine its membership was addressed in the case of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). That case involved an attack upon a tribal ordinance which denied membership to childrn of female members who married outside the tribe while extending membership to children of male members who married outside the tribe. In determining not to interfere with the tribe's right to establish its own rules for membership, the Supreme Court quoted favorably from the District Court's opinion:

> To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it[4].

What we have in this case is a similar situation. Plaintiff wants this Court to interfere with a tribal decision to not permit non-enrolled tribal members to vote or run for office. The Martinez case clearly estalishes the tribe's right to decide who will be its members. Certainly, therefore, the tribe has the right to decide that it does not want non-enrolled members to vote in its elections or run for its offices. There is no question the reason Plaintiff was not certified as a candidate was because of his status as an N.E. However, in light of Martinez, it appears to

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[4]In addition to determining its own membership, it appears that Martinez would stand for the proposition that Indian tribes be given great latitude in regard to the question of eligibility to vote and run for office. Therefore, it would appear that the Martinez decision raises serious doubts as to the continued viability of the Eighth Circuit's unfortunate decision in Luxon v. Rosebud Sioux Tribe of South Dakota, 455 F. 2d 698 (8th Cir. 1972).

this Court that the actions of the tribe were not motivated by an invidiously discriminatory animus against Plaintiff because of his status as an N.E.

> The requirement that the discrimination be "class-based" is not satisfied by an allegation that there was a conspiracy which affected the interests of a class of persons similarly situated with the plaintiffs. Rather, the complaint must allege facts showing that the defendants conspired against the plaintiffs because of their membership in a class and that the criteria defining the class were invidious. Harrison v. Brooks, 519 F. 2d 1358 (1st Cir. 1975).

It appears to this Court that there are no facts which could be presented to prove that the criteria defining the N.E. class were invidious or that Plaintiff was unlawfully discriminated against because of his membership in that class. Based on the foregoing, this Court concludes that Plaintiff cannot recover under § 1985 (3) and therefore, Defendants' motion for summary judgment will be granted.

There also appears to be a serious doubt as to whether Plaintiff has exhausted his tribal remedies. However, due to the foregoing, the issue of exhaustion need not be addressed in this opinion.

BY THE COURT

ANDREW W. BOGUR, CHIEF JUDGE
UNITED STATES, DISTRICT COURT

1c

[illegible] APPLICATION
[illegible] SIOUX TRIBE
[illegible] ENROLLMENT
[illegible] DAKOTA

Pursuant to Ordinance No. 79-06 of the Oglala Sioux Tribe, adopted by the Oglala Sioux Tribal Council on June 21, 1979, application is hereby submitted for enrollment with the Oglala Sioux Tribe of Pine Ridge Indian Reservation, South Dakota for the following person:

NAME Thomas Henry Shortbull DATE OF BIRTH 12-04-46

PLACE OF BIRTH Igloo, S.D. DEGREE OF INDIAN BLOOD 15/32

TRIBE Oglala IS APPLICANT NOW OR HAS APPLICANT EVER BEEN ENROLLED

WITH ANY TRIBE OF INDIANS? YES ___ NO X. (IF YES, WHAT TRIBE? _____

CURRENT ADDRESS Box 548 DISTRICT Wakpamni

PARENTAL HISTORY

NATURAL FATHER	NATURAL MOTHER (MAIDEN NAME)
NAME Herman Everett Shortbull	NAME Elizabeth Grace Bear
DATE OF BIRTH Womble's	DATE OF BIRTH 9-1-23
PLACE OF BIRTH 3-11-18	PLACE OF BIRTH Rosebud
TRIBE Oglala NO. 10406	TRIBE Rosebud NO. 93-2
CURRENT ADDRESS Deceased - 1975	CURRENT ADDRESS 2411 3rd Ave S.E. Apt 3-5, Aberdeen

The undersigned each hereby certify on behalf of the applicant and themselves that the foregoing information is true and correct and that if any material statement is false, any enrollment granted pursuant to this application shall be void and will be of no force or effect.

Thomas Shortbull
Applicant

Subscribed and sworn to before me this ___ day of _____ 19___.

_____
Notary Public

My commission expires _____

_____
Parent of Minor

Subscribed and sworn to before me this 24 day of September 19 82.

JO ANN WHALEN NOTARY PUBLIC SOUTH DAKOTA

Jo Ann Whalen
Notary Public

My commission expires 8-17-84

This is to certify that the above application was reviewed by the Enrollment Committee and posted in accordance with Ordinance No. 79-06 and on the 28th day of Jan. 19 82 was APPROVED X; DISAPPROVED ___; TABLED ___; (listed below reason(s) for disapproval or tabled).

ENROLLMENT NO. UA5875

Chairman, Enrollment Committee

Reason(s) for Disapproval - Tabled: _____

It is the responsibility of those filing the application to furnish the necessary documents of proof establishing these statements. (See reverse side for documents needed).

You have sixty (60) days from date of receipt of notice to appeal this decision granted in Article IV of Ordinance No. 79-06, or submit additional information for reconsideration.